

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 04-0331
Responsible Officer Liability—Duty to Remit Sales Tax
Penalty—Request for Waiver
For Tax Year 2001

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ISSUES

I. Responsible Officer Liability—Duty to Remit Sales Tax

Authority: IC § 6-2.5-2-1; IC § 6-2.5-9-3; 45 IAC 2.2-2-2; 45 IAC 2.2-9-4; *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995)

Taxpayer protests the Department's determination of responsible officer liability for sales tax not paid during the assessment period.

II. Penalty—Request for waiver

Authority: IC § 6-8.1-10-2.1; 45 IAC 15-11-2

Taxpayer protests the imposition of the 10% negligence penalty and requests a waiver.

STATEMENT OF FACTS

Taxpayer protests the Department's determination of responsible officer liability, based on the following facts. Taxpayer incorporated the business, whose gross retail tax liability is at issue, in 1993. Taxpayer claims to have resigned as an officer of the corporation in 1996 when all shares in the company were sold to a third party who dissolved the corporation in 2003. Additional facts will be supplied as necessary.

I. Responsible Officer Liability—Duty to Remit Sales

A gross retail (sales) tax is imposed on retail transactions made in Indiana. While this sales tax is levied on the purchaser of retail goods, it is the retail merchant who must "collect the tax as agent for the state." *See*, IC § 6-2.5-2-1 and 45 IAC 2.2-2-2.

Individuals may be held personally responsible for failing to remit any sales tax. In determining who may acquire personal liability, IC § 6-2.5-9-3 is applicable:

An individual who:

- (1) is an individual retail merchant or is an employee, officer, or member of a corporate or partnership retail merchant; and
- (2) has a duty to remit state gross retail or use taxes (as described in IC § 6-2.5-3-2) to the department;
holds those taxes in trust for the state and is personally liable for the payment of those taxes, plus any penalties and interest attributable to those taxes to the state.

See also, 45 IAC 2.2-9-4.

In order to determine which persons are personally liable for the payment of these “trust” taxes, the Department must initially determine which parties had a duty to remit the taxes to the Department. *Indiana Department of Revenue v. Safayan*, 654 N.E.2d 270, 273 (Ind. 1995) is instructive:

The method of determining whether a given individual is a responsible person is the same under the gross retail and the withholding tax.... An individual is personally liable for unpaid sales and withholding taxes if she is an officer, employee, or member of the employer who has a duty to remit the taxes to the Department.... The statutory duty to remit trust taxes falls on any officer or employee who has the authority to see that the taxes are paid.

The Indiana Supreme Court in *Safayan* identified three relevant factors:

- (1) the person’s position within the power structure of the corporation;
- (2) the authority of the officer or employee as established by the articles of incorporation, bylaws, or the person’s employment contract; and
- (3) whether the person actually exercised control over the finances of the business.

The Supreme Court also stated in *Safayan* that “where the individual was a high ranking officer, we presume that he or she had sufficient control over the company’s finances to give rise to a duty to remit the trust taxes.” *Id.* at 273. The Department further notes that *Safayan* specifically rejects the defense of failure by an officer to exercise oversight.

Taxpayer has provided documents showing that taxpayer did indeed resign from the corporation as an officer in 1996, along with the other officers, who then sold all shares in the business to a third party.

The Department finds that taxpayer has provided sufficient evidence to overturn the Department's initial determination of responsible officer liability.

FINDING

Taxpayer's protest concerning the Department's determination of responsible officer liability for unpaid gross retail taxes is sustained.

II. Penalty—Request for waiver

DISCUSSION

Taxpayer protests the imposition of the 10% negligence penalty on the assessment. Since the Department has sustained taxpayer's protest on the merits, the penalty protest has been rendered moot.